83-394

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

BENNIE J. McKENZIE,

ANTHONY W. McKENZIE,

JANE H. TUTTLE,

GARY L. WHITE,

EDWARD C. REIDLINGER,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

LOCAL UNION 93 OF THE INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW,

INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Leland C. Smith, II
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320 North Fifth St.
St. Charles, Missouri 63301
314/947-1000
Counsel for the Petitioners

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the inclusion of Trade Readjustment Allowances in the Supplemental Unemployment Benefits Plan calculation of the amount of Supplemental Unemployment Benefits due to eligible employees (integration of Supplemental Unemployment Benefits with Trade Readjustment Allowances): is prohibited by the exemption from offset and recovery provision of 29 C.F.R. 91.60; is prohibited by the Employee Retirement Income Security Act of 1974, and specifically prohibited by the integration guidelines set forth in Alessi v. Raybestos-Manhattan, Inc., and Buczynski v. General Motors Corporation, 451 U.S. 504, 520 (1981); violates the spirit and intent of the Trade Act of 1974; renders the employer and unions liable for breach of the fiduciary duty; and, on the alleged recovery of alleged overpayments of Supplemental Unemployment

Benefits, renders the employer and unions liable for conversion, conspiracy, and punitives?

2. Whether the employees efforts to exhaust the remedies were met with arbitrary, capricious, or in bad faith conduct by the employer and unions so as to negate final and binding the decision of the Board of Administration and thus render the unions liable for breach of the duty of fair representation and thus render the employer liable for breach of the collective bargaining agreement?

3. Whether this action is properly maintainable as a class action and appropriately a b(2) action?

4. Whether the employees are entitled to attorney's fees and how much?

5. Whether the employees motion to amend the complaint to conform to the evidence should be allowed?

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TRADE ACT OF 1974

IN THE SUPREME COURT OF THE UNITED STATES

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INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA-UAW,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme

Court of the United States:

The Petitioners (employees) herein, pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on June 30, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is produced in Appendix A hereto, infra, page A-1, with its Journal Entry of Judgment produced at page A-8. The opinion of the United States District Court for the Western District of Missouri, Western Division, is unreported and is produced in Appendix B hereto, infra, page B-1 and B-25, with its Journal Entry of Judgment produced at page B-30.

JURISDICTION

The Judgment of the United States

Court of Appeals for the Eighth Circuit (Appendix A, infra, page A-8) was entered on June 30, 1983. The Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c), as follows:

28 U.S.C. 1254. Courts of appeals; certiorari, appeal; certified questions

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> ...
>
> (June 25, 1948, ch. 646, 62 Stat. 928.)

28 U.S.C. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

> (a) A direct appeal to the Supreme Court from any decision under Sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interloc-

utory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

...

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, sec. 106, 63 Stat. 104.)

STATUTES AND REGULATIONS INVOLVED

Trade Act of 1974

19 U.S.C. 2320. Regulations

> The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this part.
>
> (Pub. L. 93-618, title II, sec. 248, Jan. 3, 1975, 88 Stat. 2029.)

29 C.F.R. 91.3 Definitions.

> (a) As used in this Part 91--
>
> (1) "Act" means Chapter 2 of Title II of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, 2019-2030 (19 U.S.C. 2271-2322).
>
> (2) "Adjustment assistance" means trade readjustment allowances, training and training allowances, job search allowances, relocation allowances, employment services, and any other right or benefit provided for adversely affected workers by the Act.

29 C.F.R. 91.60 Exemption.

> Any assignment, pledge, or encumbrance of any right to adjustment assistance which is or may become due and payable under this Part 91 shall be void; and such right to adjustment assistance shall be exempt from levy, execution, attachment, garnishment, order for the payment of attorney fees, offset or recovery of overpayments under any

law other than the Act, or any other remedy whatsoever provided for the collection of debt whether owed to the United States, a State, or a person; and adjustment assistance received by an individual shall be exempt from any remedy whatsoever for the collection of all debts, except necessaries furnished to such individual or the individual's family during the time when such individual was unemployed. Any waiver of the exemption provided for in this section shall be void.

Employee Retirement Income Security Act of 1974

29 U.S.C. 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the invest-

ments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over

the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Pub. L. 93-406, title I, sec. 404, Sept. 2, 1974, 88 Stat. 877.)(As amended Pub. L. 96-364, title III, sec. 309, Sept. 26, 1980, 94 Stat. 1296.)

29 U.S.C. 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

(A) Sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not--

(1) deal with assets of the plan in his own interest or for his own account.

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

(Pub. L. 93-406, title I, sec. 406, Sept. 2, 1974, 88 Stat. 879.)

29 U.S.C. 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

(Pub. L. 93-406, title I, sec. 409, Sept. 2, 1974, 88 Stat. 886.)

29 U.S.C. 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equit-

able relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i)of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of title 26 (or with respect to which application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145

of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such ser-

vice. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of

parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citzenship of the parties, to grant the relief provided for in subsectiopn (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be

paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect

to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary (except as provided in section 518(a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel

him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Pub. L. 93-406, title I, sec. 502, Sept. 2, 1974, 88 Stat. 891.)(As amended Pub. L. 96-364, title III, sec. 306(b), Sept. 26, 1980, 94 Stat. 1295.)

Labor Management Relations Act of 1947

29 U.S.C. 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in

this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person

is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, ch. 120, title III, sec. 301, 61 Stat. 156.)

District Courts; Jurisdiction

28 U.S.C. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(As amended Dec. 1, 1980, Pub. L. 96-486, sec. 2(a), 94 Stat. 2369.)

Courts of Appeals; Jurisdiction

28 U.S.C. 1291. Final decisions

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, sec. 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, sec. 12(e), 72 stat. 348.)

STATEMENT OF THE CASE

(Reference: app. 82-2076WM Eighth Cir.)

The employer General Motors Corporation operates the GM Assembly Division, Leeds Plant, located in Kansas City, Missouri, where intermediate-sized automobiles are finally assembled. The named employees and the class of persons they seek to represent are hourly-rated employees at the Leeds Plant and at all times pertinent hereto approximately 4,000 hourly-rated employees were employed at the Leeds Plant. The exclusive bargaining representative for these employees is the United Automobile, Aerospace and Agricultural Implement Workers of America (International union) and its Local 93 (Local 93) (unions) (app. 253).

The terms and conditions of employment of these employees are governed by a collective bargaining agreement negotiated by the employer and the International union (app. 253). The collective bar-

gaining agreement established a Supplemental Unemployment Benefit fund (SUB fund) which is funded, by contributions from the employer (app. 253), based on the applicable cents-per-hour multiplied by the number of hours the employee works for the employer not to exceed 100% maximum funding of the fund (app. 81-87). The number of cents-per-hour contributions decrease as the percentage of maximum funding increases (app. 81, 82, 83). The plan for the fund, known as the Supplemental Unemployment Benefits Plan (SUB Plan) (app. 31, 35-122, 253), basically provides for the supplementation of state unemployment compensation benefits and other compensation received by laid-off employees to a level equal to 95% of the employees' weekly after-tax pay, less the sum of $12.50 reflecting work-related expenses not incurred by the employees (app. 58, 254). The employer is the spon-

soring employer, administrator of and a fiduciary with respect to the SUB Plan (app. 261).

Beginning in December, 1979 and continuing through October, 1980, hourly-rated employees at the Leeds plant were subjected to economic reduction in force lay-offs resulting from the lack of sales of automobiles assembled at the plant (app. 255). In late January, 1980, as a result of layoffs at the Leeds Plant and at other plants, the International union filed its petition for certification of eligibility to apply for worker adjustment assistance benefits on behalf of its members at several final assembly plants across the country, including the Leeds Plant (app. 256). This petition was filed under the provisions of the Trade Act of 1974, 19 U.S.C. 2101-487, and specifically Section 221 of that act, 19 U.S.C. 2271 (app. 256-257). On April

25, 1980, the petition as to the Leeds Plant and other plants was approved by the Department of Labor, Office of the Secretary. This certification stated in part:

> "All workers of the final assembly plants of General Motors Corporation listed in the appendix who became totally or partially separated from employment on or after the impact date listed in the appendix are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974" (app. 170-174, 257).

The impact date for the Leeds plant was determined to be October 1, 1979 (app. 257).

The adjustment assistance benefits the employees received are called Trade Readjustment Allowances (TRA) [app. 411, 29 C.F.R. 91.3(a)(2)] and the source of TRA is the general funds of the United States Treasury (app. 440). In a letter, dated February 20, 1981, from Nathaniel Baccus III, U.S. Department of Labor, Office of the Soliciter, Washington, D.C.

20210, the employees were informed that:

> "Congress has followed the practice of appropriating monies from the general funds of the Treasury for payment of TRA. The appropriations are contained in the Department of Labor appropriations under the heading "Federal Unemployment Benefits and Allowances," commonly referred to as the "FUBA appropriation" or "FUBA account." A typical example of this appropriation is furnished by P.L. 95-480, 92 Stat. 1567, the Department of Labor's 1979 appropriations act. TRA flows from the general funds of the United States Treasury into the FUBA account and thence into the hands of State employment security agencies, as provided in section 241 of the Trade Act of 1974" (app. 440-443).

In Missouri the State agency for disbursement of the TRA is the Missouri Division of Employment Security, 19 U.S.C. 2311-13, 29 C.F.R. 91.6-14 (1979) (app. 257). In mid-May, 1980, the employees made initial applications, for TRA, at the Local 93 Union Hall in response to a postcard sent, by Local 93, to each employee. The message on the postcard was as follows:

> "T.R.A. has been approved. All members must apply for this benefit. You should report to Local 93's

> Union Hall on May (date blanks were filled in by long hand) 1980 at (time blanks were filled in by long hand). Bring positive I.D. (Badge or Drivers License). If you are scheduled to work at this time please call the Union Hall for re-scheduling. ROBERT O. SANDERS, PRESIDENT, LOCAL #93, U.A.W." (document to request 1 of Plaintiffs' Request for Admission, Exhibit 3 to Dep. of Bennie J. Mckenzie 11/25/80, app. 346).

At the Local 93 Union Hall the employees made application for those weeks subsequent to October 1, 1979, for which they had been on lay-off, weeks in which they had already been paid unemployment compensation benefits and SUB (app. 257, 346). On or shortly after May 21, 1980, each of the employees received written notification from the Missouri Division of Employment Security advising each of them of their entitlement to TRA pursuant to the Trade Act of 1974 (app. 258). The first TRA checks issued by the Missouri Division of Employment Security were issued on May 21, 1980, and reflected retroac-

tive benefits for weeks the employees had already received unemployment compensation and SUB (app. 258). It was not until July, 1980, that TRA were paid contemporaneously with the benefit week of unemployment and the retroactive payments ceased (app. 258) and the employer began reducing the payment of SUB equal to the amount of TRA received or receivable by the employees (app. 33, 58-59, 96). The employer has integrated SUB with TRA for the entire period of TRA payments, to the employees, either by offset of SUB or recovery of alleged overpayment of SUB. The employer integrated SUB with $2830.73 of TRA received by employee Bennie J. McKenzie (app. 123, 208-215, 471-475), $4077.00 received by Anthony W. McKenzie (app. 124, 215-223, 475-485), $3690.00 received by Gary L. White (app. 126, 229-236, 486-490), $5902.44 received by Edward C. Reidlinger (app. 127, 236-

243, 491-493) and $944.00 received by Jane H. Tuttle (app. 125, 223-229). The payments were for weeks of lay-off from October 1, 1979, to October 1, 1981.

On September 9, 1980, each of the named employees and the members of the class, they seek to represent were mailed by first class mail, postage prepaid, a "Determination of Overpayment of Benefits by Reason of Receipt of Trade Readjustment Allowance Benefits Supplemental Unemployment Benefit Plan" (app. 123-127) advising them that the SUB Examiner, GM Assembly Division, Leeds Plant, had determined that the retroactive payments of TRA created an overpayment of SUB and advised them of the amount of estimated gross amount before taxes of SUB allegedly overpaid (app. 258-259). The notice further stated "if you do not contact the SUB Office within 30 days of receipt of this notice, the overpayment will be

recovered by deductions of $30 per week from future paychecks..." (app. 123-127). Further notice, by letter dated September 12, 1980, from the Board, was sent to all employees who received SUB and were eligible for TRA for the same periods of lay-off and the letter stated:

> "If you are eligible to receive TRA but have not yet applied for TRA, you should do so immediately because the amount of TRA to which you are entitled - even if not applied for by you - is considered an overpayment of SUBenefits and must be repaid" (app. 133).

Those employees who failed to voluntarily return the claimed overpayment have had their weekly pay reduced by $30.00 (app. 208-215, 215-223, 223-229, 229-236, 236-243, 260).

The SUB plan provides for an appeal procedure whereby an employee may appeal from the employer's written determination regarding the payment or denial of SUB, including the employer's determination of an overpayment (app. 73, 254, 255). The

appeal procedure contemplates a possible two-stage appeal, the first stage being to the Local Committee of the Board of Administration, and if the appeal is not resolved by the Local Committee, then there is further appeal to the Board of Administration (Board) (app. 73, 74, 255). The Local Committee and the Board have duties limited generally to the determination of whether an employee is entitled to benefits under the SUB plan through its determination of employee appeals (app. 76-78, 254). However, the Board shall have no jurisdiction to act upon any appeal filed after the applicable time limit or upon any appeal that does not comply with the Board-established procedures (app. 77). To initiate an appeal, an employee must file a written appeal with the Local Committee on forms provided for that purpose within 30 days following the date of mailing of the

determination appealed (app. 73, 74, 113, 118, 255). The Local Committee shall advise the employee, in writing, of its resolution of, or failure to resolve his appeal (app. 74, 255). If the appeal is not resolved within 10 days after the date thereof (or such extended time as may be agreed upon by the Local Committee), the employee, or any 2 members of the Local Committee, at the request of the employee may refer the matter to the Board for disposition (app. 74, 255). An employee must file a written appeal with the Board on forms provided for that purpose within 30 days following the date the notice of the Local Committee's decision is given or mailed to the employee (app. 74, 114, 116, 117, 121). An appeal to the Board shall be considered filed with the Board when filed with the designated representative for the plant at which the first stage appeal

was considered by the Local Committee (app. 74). There is no appeal from the Board's decision. It shall be final and binding upon the union, its members, the employee, the trustee, and the employer (app. 74, 255). If the employee disagrees with the Local Committee resolution of the claim the employee may request the Local Committee to refer the claim to the Board (admission 10 to plaintiffs' request for admission, p. 34).

Within the 30-day period provided for appeal, in tne SUB Plan, 281 appeals were filed contesting the Determination of Overpayment (app. 259). On November 20, 1980, the Local Committee notified the employees that:

> "The Local Committee by unanimous decision has determined that the notice of overpayment was issued properly in accordance with Article II, (Section) 6 of the Supplemental Unemployment Benefit Plan because notice was given within 120 days from the date the overpayment was established or created" (app. 259).

On December 18, 1980, employees Anthony W. McKenzie, Bennie J. McKenzie and Edward C. Reidlinger filed an appeal to the Board with the Local Committee who returned the appeal, on December 23, 1980 (admission 19 to Plaintiffs' request for admission), with a notice as follows:

> "This appeal has no status under the appeal procedure of the SUB plan under Article V, Section 3, (B), (1) (iii). The local committee advised you in writing of the resolution of your appeal, therefore no further appeal is contracualy (sic) permitted" (app. 261-262).

On January 19, 1981, the individual-named employees herein initiated an internal union appeal contesting the manner in which the unions had handled the grievance filed with the Local Committee under the provisions of the SUB Plan (app. 260). Subsequently, by letter dated February 20, 1981, the International union President, Douglas A. Fraser, advised the employees that he had contacted the Board and requested them to accept the appeals

of employees Anthony W. McKenzie, Bennie J. McKenzie, Edward C. Reidlinger and Gary L. White (app. 260). The day before the summary judgment motions were due, by letter dated April 21, 1981, those four employees were advised by the Board that it would accept their appeal and that the four employees had a period of thirty days within which to submit to the Board their written positions stating the respects in which they claimed the SUB plan was violated and the facts relied upon as justifying a reversal or modification of the determination being appealed (app. 260, 275-278). On May 1, 1981, each of the four employees filed their Board appeal which contained copies of all the court filings (app. 261, 264). On July 23, 1981, the Board rendered its decision as follows:

> "It is the determination of the Board of Administration that the amount of the SUBenefit overpayment stated on the "Determination of Over-

payment of SUBenefits by Reason of Receipt of Trade Readjustment Allowance Benefits" form previously furnished the claimants is the valid amount due and owing to the SUB Trust Fund. The claimants, therefore, are required to repay such amount of overpayment in accordance with the SUB Plan Provisions" (app. 263).

In its discussion the Board stated "The SUBenefits overpayments are "established or created" as of the date the Company becomes aware that the TRA benefits which caused the overpayment were paid" (app. 266). The SUB plan states that:

> "L. Determination of Date SUBenefit Overpayment Established or Created.
>
> For purposes of compliance with the 120 day time limit (pursuant to Article II, Section 6 of the Plan) for notifying Employes of any SUBenefit overpayment which results from a Company error in calculating a SUBenefit, such 120 day period shall be determined as beginning on the date of issue of the SUBenefit draft or check involved" (app. 117).

Under the SUB plan TRA are listed as a State System Benefit (app. 96) and, pursuant to the SUB plan, SUB is added to the

amount of State System Benefit received or receivable by the employee for the week to a level which will equal 95% of his after-tax pay, minus $12.50 (app. 58).

Regarding maximum funding the Board stated "At the time claimants began their lawsuit (October 1980), the fund was at 3.6% of maximum funding. As of July 1981, the funding level is 32%" (app. 268). During both of the years 1980 and 1981, with each 7.5% increase in the percentage of maximum funding, above 2.5%, the employer contributed 1¢ less per hour that each employee worked and at 85% of maximum funding the employer could save 12¢ an hour, per employee, over what had to be contributed at less than 2.5% of maximum funding (app. 81-83).

The District Court's jurisdiction is based on the provisions of Section 502(e)(1) and 502(f) of the Employee Retirement Income Security Act of 1974

(ERISA), 29 U.S.C. 1132(e)(1) and 29 U.S.C. 1132(f), Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, and under the provisions of 28 U.S.C. 1331 in that this is an action arising under the laws of the United States. The employees filed suit to enforce their rights under the terms of an employee welfare benefit plan within the meaning of Section 3(1) of ERISA, 29 U.S.C. 1002(1) and to enforce their rights within the meaning of Section 502(a)(1)(B), Section 502(a)(2), Section 502(a)(3)(A), Section 502(a)(3)(B), and Sections 502(a)(3)(B)(i) & (ii) of ERISA, 29 U.S.C. 1132(a)(1)(B), 29 U.S.C. 1132(a)(2), 29 U.S.C. 1132(a)(3)(A), 29 U.S.C. 1132(a)(3)(B), and 29 U.S.C. 1132(a)(3)(B)(i) & (ii). This is also an action for the unions' breach of the duty of fair representation and the employer's breach of the collective bargain-

ing agreement and their breach of the fiduciary duty in the administration of the employee welfare benefit plan (entire para., app. 2, 160, 189, 495-496).

On October 23, 1980, the employees filed a petition in the Circuit Court of Jackson County, Missouri, on behalf of themselves and others similarly situated. On October 30, 1980, the petition/complaint was removed to the United States District Court for the Western District of Missouri (app. 1-22, 583). The employees filed a motion for class certification on November 4, 1980 (app. 26, 583). On March 10, 1981, the employees filed their first motion for summary judgment on the bases that integration was prohibited by 29 C.F.R. 91.60 (1975) (app. 207-243, 587). Then on the employer and unions challenge the court, on March 17, 1981, directed the employees to submit all the issues of the case in a

summary judgment motion on the court ordered date for submission of motions and authorities (app. 587), however, on that date of April 22, 1981, when the employees filed their second motion for summary judgment (app. 244, 588) the employer and unions countered with a motion for a stay (app. 588) to allow the employer and unions Board of Administration the opportunity to hear the employees' concerns. The stay was granted on April 24, 1981 (app. 246, 588). Subsequently, on July 30, 1981, on motion (app. 588) of the employees, the stay was vacated and the parties ordered to agree on a scheduling for motions and authorities (app. 248, 588). All the cross motions for summary judgment, and related pleadings including stipulation of facts were filed on or before October 1, 1981 (app. 589), except the depositions filed on October 5, 1981 (app. 589). The employees filed

a motion for leave to file amended complaint to conform to the evidence on October 1, 1981 (app. 494, 589), with an amended motion on October 2, 1981 (app. 520, 589). Then on August 13, 1982, the court decided that:

> "class certification should be denied, that plaintiffs' proposed amended complaint would not materially alter the issues, or otherwise state a claim upon which relief can be granted, that no material facts are in dispute, and that defendants are entitled to judgment as a matter of law" (p. B-1 - B-2, app. herein)

Included in the order was a schedule for submission of motions for attorneys' fees (p. B-23, app. herein) to which the employees filed a motion (app. 568-578). The court denied the employees' motion for attorney fees and directed entry of final judgment on August 30, 1982 (p. B-25 - B-29, app. herein).

The employees' Notice of Appeal was filed with the clerk of the district court on September 7, 1982 (app. 581,

590). The Eighth Circuit Court's appellate jurisdiction is based on 28 U.S.C. 1291 under which the court of appeals as a matter of right may review final decisions of the district court.

ARGUMENT FOR GRANTING WRIT

There have been at least 8 cases involving the integration of Supplemental Unemployment Benefits (SUB) with Trade Readjustment Allowances (TRA) in various federal and state courts and at least 3 appeals to 3 different federal circuits. However, petitioners are not aware of any federal court of appeals that has rendered a published opinion on the issues. But more importantly the lower courts have either not been aware of the federal question or have decided the federal question in a way in conflict with applicable decisions of this Court. In Alessi v. Raybestos-Manhattan, Inc., and Buczynski v. General Motors Corporation,

451 U.S. 504 (1981), this Court specifically outlined the legal criteria for integrating private benefits with public benefits, however no lower court has followed those guidelines on integration of SUB with TRA. And, in Alessi, at 521-526, this Court stated how non-integration law was to be applied, as in this instance 29 C.F.R. 91.60 (1975) exempts TRA from "offset or recovery of overpayments". Furthermore, in the case at bar, the federal court of appeals has decided a federal question in conflict with Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

I.

Integration Issues

In the case at bar, it is clear that the employer is offsetting or recovering alleged overpayments of SUB in an amount equal to the TRA received or receivable by the employee (integration of SUB

with TRA) (app. 33, 58-59, 96, 123-127, 133, 208-243, 259, 471-493) and it is also clear that the employer does not contribute to a fund for TRA (app. 440). The calculation called "integration" is "a calculation practice under which benefit levels are determined by combining... [benefit] funds with other income streams available to the...employees", Alessi, supra at 514.

The employees argue that the "threshold issue: what defines the content of the benefit", Alessi, supra at 511, has been answered by this Court on 2 points that bear directly to the case at bar. (1) The government benefits fund regulation, 29 C.F.R. 91.60 (1975), prohibiting "offset or recovery of overpayments" "...applies directly to the calculation technique..." of integrating private benefits with public benefits (SUB with TRA), Alessi, supra at 521-526; and (2) before

private benefits can be integrated with public benefits (SUB with TRA) "the employer must contribute to the other benefit funds", Alessi, supra at 520.

The regulation 29 CFR 91.60 (1975), promulgated under 19 U.S.C. 2271-2322, states:

> "Any assignment, pledge or encumbrance of any right to adjustment assistance which is or may become due and payable under this Part 91 shall be void; and such right to adjustment assistance shall be exempt from levy, execution, attachment, garnishment, order for the payment of attorney fees, offset or recovery of overpayments under any law other than the Act, or any other remedy whatsoever provided for the collection of debt whether owed to the United States, a State or a person; and adjustment assistance received by an individual shall be exempt from any remedy whatsoever for the collection of all debts, except necessaries furnished to such individual or the individual's family during the time when such individual was unemployed. Any waiver of the exemption provided for in this section shall be void" (emphasis added).

As the New Jersey State statute prohibited pension benefit offsets based on

workers compensation awards in Alessi, supra at 521-526, so does this regulation prohibit the inclusion of TRA in the Supplemental Unemployment Benefits Plan (SUB Plan) calculation of the amount of SUB due eligible employees (integration of SUB with TRA). The employer admitted in Buczynski v. General Motors Corporation, 456 F. Supp. 867, at 871 (D. New Jersey 1978) that the deductions it is making in the "retirement pension benefits are prohibited by the recent amendment to New Jersey's Worker's Compensation Act." One major difference between the New Jersey statute and the regulation is that the New Jersey State statute is "an impermissible intrusion on the federal regulatory scheme", Alessi, supra at 525, however, 29 CFR 91.60 (1975) is part of the regulatory scheme and, therefore, not preempted, by the Employee Retirement Income Security Act of 1974, as was the

New Jersey Statute, Alessi, supra at 526. In fact 29 C.F.R. 91.60 (1975) sanctions the federal regulatory scheme that to integrate private benefits with public benefits "the employer must contribute to the other benefit funds", Alessi, supra at 520.

As in Alessi, supra, the issue herein is the legality of the calculation that defines the content of the benefit. The lower courts held that Alessi "deals with nonforfeitability of vested pension rights, and is inapplicable to the case at bar." (p. B-21 - B-22, app. herein). However, it is applicable as this Court stated, in Alessi, supra at 516 and at 512 respectively, that "The nonforfeiture provision of 1053(a) has no...applicability to this kind of integration" "the statutory definition of "nonforfeitable" assures that an employee's claim to the protected benefit is legally enforceable,

but it does not guarantee a particular amount or method for calculating the benefit."

The employees argue that the benefit of TRA is not going to the intended beneficiary when SUB is integrated with TRA but to an unintended beneficiary the employer. Every time the employer integrates SUB with TRA it is benefiting, because the employer is the contributor to the SUB fund and whenever TRA replaces SUB less contributions have to be made (app. 81-87). The employer contributes at a decreasing rate as the percentage of Maximum Funding increases (app. 81-83) and if the SUB fund has Maximum Funding the employer does not contribute (app. 87).

Essentially what is happening, through integration, is the government is paying the liabilities of the employer and the benefit of TRA is not going to

the intended employees. The employees are not now getting more monetarily than they would otherwise, however, the employer is now getting more monetarily than it would otherwise (see illustration of TRA value flow, app. 245, 437). By allowing the employer to be the benficiary of the TRA, through integration, there are less unemployment benefits available for the intended beneficiaries, namely, the employees. The employees argue that the reason for 29 C.F.R. 91.60 (1975) and the regulations under ERISA is that "the employer must contribute to the other benefit funds" Alessi, supra at 520, to prevent the employer from becoming the beneficiary of benefits designed for laid off or unemployed workers.

The lower courts have alleged that the employees are, during unemployment, seeking "income in excess of what they would have earned had they been employed"

(p. A-4, B-13 - B-14, app. herein). But that is not the issue. The employees had no choice but to apply for the TRA, because if they had not applied the employer and unions would, nevertheless, have required them to pay the alleged overpayments (app. 133). While SUB funds were available the employees should not have been entitled to TRA but it was foisted on them (app. 133, 346, post card "T.R.A. has been approved. All members must apply for this benefit." admission 1 to plaintiffs' request for admissions). And, the employees are not seeking the windfall that some would have us believe. In fact the employees have consistently maintained that they should not have received the TRA while SUB was available (app. 438, 563; p. B-16, app. herein) and have alternatively asked in their prayer that the integrated amounts be placed in the appropriate fund (app.

505). In light of the maximum funding provisions of the SUB Plan (app. 81-87) it is obvious who is seeking a windfall. The employees are genuinely concerned about the fact that the employer is integrating SUB with funds to which the employer has not contributed and the employees object strenuously to being used as a conduit through which the employer receives the monetary value of the TRA.

Although, the Labor Department was an accessory in helping the employer obtain the monetary value of TRA (app. 345-346, 429-436) in violation of the legal principles stated above, nevertheless, "the government cannot set up regulations and then disregard them, Brown v. United States, 377 F. Supp. 530, 539 (N.D. Texas 1974).

> "As noted by the Supreme Court, when an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must rigorously comply

with these requirements. Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed2d 1403 (1957); Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L.Ed.2d 1012 (1959). The regulations are regarded as having the force of law, and therefore become a part of the statutes authorizing them. 77 Am.Jur.2d, United States, Section 52, page 53 (1975)" American Fed. of Gov. Employees, Local 1858 v. Calloway, 398 F. Supp. 176, 191 n. 1 (N.D. Alabama 1975).

The employees argue that the employer has breached its fiduciary duty by contributing less to the SUB fund as a result of intregating SUB with TRA. Instead of paying the SUB as required the employer has illegally integrated and sought to retain the funds in the SUB fund so it has to contribute less. Thus the employer has dealt "with the assets of the Plan in (its) own interest or for its own account" [sec. 406(b)(1) of ERISA, 29 U.S.C. 1106(b)(1)] and has not discharged its "duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing

benefits to participants and their beneficiaries" [sec. 404 of ERISA, 29 U.S.C. 1104]. As a result of the breach of fiduciary duty the employer should contribute into the SUB fund the exact monetary advantage it has received as a result of integrating SUB with TRA [sec. 409(a) of ERISA, 29 U.S.C. 1109(a)]. In a situation of self dealing and prohibited transactions "The settled law is that in such situations the burden of proof is always on the party to the self dealing transaction to justify its fairness", Marshall v. Snyder, 572 F. 2d 894, 900 (2nd. Cir. 1978) citing Pepper v. Litton, 308 U.S. 295, 306-307 (1939). In the case at bar the employer has never responded to the employees allegations that it was contributing less into the SUB fund, as a result of integrating SUB with TRA, although the allegations were made as early as April 22, 1981, in the sugges-

tions to the Second Motion for Summary Judgment (app. 245). But the employees contend that the most damaging evidence against the employer is the fact it was a party in Alessi, supra, and, thereby, knew that the integration of SUB with TRA is prohibited.

The employees also contend that the unions have breached their fiduciary duty to the employees, as administrator of the SUB fund (app. 76), by acquiescing to the integration of SUB with TRA (app. 133, 259, 263-272). And, together with the employer are liable for conversion, conspiracy, and punitives, matters not now alleged in the complaint, nevertheless, conversion and conspiracy were alleged in the Board appeal, a part of the district and circuit courts record.

II.

Contractual Issues

In the course of timely employee

appeals the unions and employer did not abide by their own rules. Consequently, the Supplemental Unemployment Benefits Plan (SUB Plan) Board of Administration (Board) decision is not final and binding. The employees assert that the following conduct by the unions and employer is arbitrary, capricious, or made in bad faith.

1. The failure of the Local Committee decision to state when the 120 day time limitation began for notification of the alleged overpayment, pursuant to Article II, Section 6(a) of the SUB Plan, and the failure to state specific reasons for their decision (app. 259).

2. The failure of the Local Committee to allow the employees' appeals to the Board within the time limits of the SUB Plan (app. 74, 166, 185, 261-262, adm. 19 to Plaintiffs' request for adm.).

3. The failure of the Board of Admin-

istration to address all of the issues on appeal (app. 77, 117, 263-272).

a. The issue of whether the Board had jurisdiction to act on the employees' appeals.

b. The issue of how item L of the items agreed to by the Board, applies to Article II, Section 6(a) of the SUB Plan.

4. The perfunctory address and failure to fully address the issue of whether, pursuant to the SUB Plan there is an overpayment of SUB as a result of retroactive payments of TRA where the TRA were not "received or receivable" for the week when the SUB were paid (app. 267).

5. The decision by the Board that "the SUBenefit overpayments are "established or created" as of the date the Company becomes aware that the TRA benefits which caused the overpayment were

paid" (app. 266), thus rendering the 120 day time limit meaningless.

The employer is charged with the general administration of the SUB Plan (app. 75, 254). As the name implies the Board of Administration also has administrative duties (app. 76-79) and is composed of an equal number of employer and union members (app. 76).

> "As a Matter of federal law, when the administrator (or trustee) of a section 302 pension fund has been given broad discretion in the management of the trust affairs, his actions as a fiduciary are proper unless "arbitrary, capricious, or made in bad faith, not supported by substantial evidence, or erroneous on a question of law" Aitken v. IP & GCU-Employer Retirement Fund, 604 F. 2d 1261, at 1270 (9th Cir. 1979).

Also see Rehmar v. Smith, 555 F. 2d 1362, at 1371 (9th Cir. 1976), Morgan v. Mullins, 643 F. 2d 1320, at 1321 (8th Cir. 1981), Rice v. Hutton, 495 F. Supp. 64, at 68 (W.D. MO, W.D. 1980).

In Rehmar v. Smith, supra., at 1370, n. 6, the Court said:

> "We do not mean to intimate that the union has no duty of fair representation in the administration of trust funds. Several cases suggest such a duty exists, see e.g., Nedd v. UMW, 400 F. 2d 103, 105-6 & n. 5 (3d Cir. 1968), but we do not express an opinion on the issue. We only hold that an action for the breach of the duty of fair representation is not the exclusive remedy for trustee denial of a fringe benefit claim."

The employees suggest that the standard for determining a breach of the duty of fair representation and the standard for reviewing trustees and administrators decisions are identical, Vaca v. Sipes, 386 U.S. 171, at 190 (1966). The employees contend that the Unions have breached the duty of fair representation by "arbitrary, capricious, or in bad faith" conduct towards the employees in their representation of the employees and in their administration of the SUB Plan and that the employer has breached the contract by not abiding by the collective bargaining agreement and by "arbitrary,

capricious, or in bad faith" conduct towards the employees in the administration of the SUB Plan. Since both the employer and the union are administrators of the SUB Plan, the same standards apply to each. Aitken v. IP & GCU-Employer Retirement Fund, supra., at 1264 & 1270.

The failure of the employer and unions to state in their Local Committee decision when the 120 day time limit began, pursuant to Art. II, Section 6(a) of the SUB Plan, or to state specific reasons for their decision that "notice was given within 120 days from the date the overpayment was established or created" (app. 259) and the failure of the Local Committee to allow the employees to appeal to the Board within the time limits of the SUB Plan are failures that show the employer and unions processed the employees' claims in a perfunctory fashion or refused to process the claims.

The processing of claims in a perfunctory fashion or refusal to process claims is arbitrary, discriminatory, or in bad faith, Hines v. Anchor Motor Freight, 424 U.S. 554, at 563, 569 & 570 (1976), Vaca, supra, at 194.

That the employer and unions processed the employees' appeals in a perfunctory fashion is further evidenced by their failure to address, in the Board decision, all of the issues on appeal. Although, the employees alleged in their Board appeal that the Board had no jurisdiction the Board did not respond (app. 264, the court filings made part of the appeal contained the allegations). When the employer and unions finally requested the employees to submit their appeals to the Board the Board simply had no jurisdiction to act on the appeals. The employees had attempted an appeal to the Board on December 18, 1980 (app. 261-262), from

the Local Committee's decision of November 20, 1980; however, the appeals were returned on December 23, 1980 (admission 19 to plaintiffs' request for admissions). "Appeals by the Employe to the Board with respect to Benefits or Separation Payments shall be made within 30 days following the date the notice of the Local Committee's decision is given or mailed to the Employe," (app. 74). The appeals to the Board having been originally filed on time by the employees, and returned by the Local Committee, could not again be filed after the time limitation. "The Board shall have no jurisdiction to act upon any appeal filed after the applicable time limit or upon any appeal that does not comply with the Board-established procedures," (app. 77). To require the employees to appeal after the time limit is conduct that is "arbitrary, capricious, or in bad faith" be-

cause the employer and unions interpreted the SUB Plan:

> "in a way which is inconsistent with the plain words of the document and which renders some requirements superfluous" or "impose(s) a standard not required by the pension plan itself, this court has stated that such action "would result in an unwarranted and arbitrary construction of the Plan," Maness v. Williams, supra, 513 F. 2d at 1267," Morgan v. Mullins, supra., at 1324 & 1321.

Although the employees alleged item L in their Board appeal the employer and unions failed to address the issue of how item L, of the items agreed to by the Board of Administration, applies to Article II, Section 6 of the SUB Plan. Item L, (app. 117), reads as follows:

> L. Determination of Date SUBenefit Overpayment Established or Created.
>
> For purposes of compliance with the 120 day time limit (pursuant to Article II, Section 6 of the Plan) for notifying Employes of any SUBenefit overpayment which results from a Company error in calculating a SUBenefit, such 120 day period shall be determined as beginning on the date of issue of the SUBenefit draft or check involved.

The employer and unions did not abide by item L when they rendered the Board decision, instead the Board stated "The SUBenefit overpayments are "established or created" as of the date the Company becomes aware that the TRA benefits which caused the overpayment were paid," (app. 266). In Danti v. Lewis, 312 F. 2d 345, at 349 (9th Cir. 1962), the Court held it was "arbitrary and capricious" to hold claimant to a resolution which did not exist when the claim was filed when in fact the claim was valid under the standards at the time the application was received. The employees suggest that the Board's decision that the overpayment is "established or created" when the Company becomes aware the TRA benefits were paid is an "arbitrary and capricious" interpretation of Article II, Section 6 of the SUB Plan. Under the Board's interpretation, if the

Company did not become aware until after 5 years, that the TRA were paid, it could still collect if notice was given within 120 days after the Company became aware of the TRA payments. Such an interpretation renders the 120 day time limit meaningless. Obviously, item L follows the intent of Article II, Section 6, to give the employee notice before he has changed his position or detrimentally relied on the SUB and that "such 120 day period shall be determined as beginning on the date of issue of the SUBenefit draft or check involved," (app. 117). Of course, the overpayment is "created or established" on issue of the SUBenefit draft or check involved, provided that the State Benefit was "received or receivable" the week for which the SUB were paid.

The reading that SUB, "payable to an eligible Employe for any Week begin-

ning on or after October 1, 1979 shall be an amount which, when added to his State Benefit and Other Compensation" (app. 58, emphasis added), combined with the reading that "an Employe's State Benefit and Other Compensation for a week means: the amount of State System Benefit received or receivable by the Employe for the Week" (app. 59, emphasis added), suggests that there is no contractual overpayment on retroactive payments of TRA unless the TRA are "received or receivable" the week for which the SUB are paid.

If the TRA are not "received or receivable" the week for which the SUB are paid, there is no overpayment; otherwise, SUB are added to State Benefits that are not in existence. The TRA were not "received or receivable" at least until April 25, 1980, the day the GMAD-Leeds employees were certified eligible

to apply for TRA (app. 257), and possibly not until May 21, 1980, the day the individual employees were determined eligible to receive TRA by the Missouri Division of Employment Security (app. 258). The difference between being eligible to apply and eligible to receive TRA is that in the latter, the "employe must show that he or she was laid off at least one week:

> 1. after the certification's impact date;
>
> 2. from adversely effected employment;
>
> 3. and in the 52 week period preceding that layoff, received wages of $30 or more for at least 26 weeks" (sec. 231 of the Trade Act of 1974, app. 266).

In any event, the employee has to be notified of an overpayment within 120 days of issue of the SUB draft or check involved and not within 120 days of the TRA check involved, (app. 117). One hundred and twenty days prior to September

9, 1980, the day the employees and the class were notified of the alleged overpayments, is May 12, 1980. Therefore, the employees and the class members should contractually retain all SUB payments prior to May 12, 1980, and if the TRA were not "received or receivable" until May 21, 1980, then the employees and the class members should contractually retain all SUB paid for weeks prior to May 21, 1980.

III.

Class Issues

The employees have no objection to denial of class certification where the relief granted to the named employees is granted to the class. Otherwise, the employees argue that this action should be certified as a 23(b)(2) class action.

Since there are in excess of 4,000 class members (app. 33, 259) the class is so numerous that joinder of all members is impracticable. The class is iden-

tified by common facts to wit, persons who:

(a) Were employed at the General Motors Corporation Assembly Division, Leeds Plant, located in Kansas City, Missouri, on or after October 1, 1979 (app. 31, 32, 33); and

(b) Were during such employment members of the unions (app. 31, 253); and

(c) Received retroactive TRA pursuant to the announcement of the Department of Labor dated April 25, 1980 (app. 31-33, 257-259); and

(d) Received or were mailed documents entitled "Determination of Notice of Overpayment of SUBenefits" (app. 33, 123-127, 259); and

(e) Who have had their SUB integrated with TRA (app. 33, 58, 123-127, 208-243, 471-493);and

(f) Who received the documents referred to in (d) above from the employer

who has or is integrating SUB with TRA for periods of lay-off more than 120 days before said documents were mailed and before the TRA were received or receivable (app. 33, 123-127, 133).

The legal issues as to the class are identical. Whether integration of SUB with TRA is prohibited and the interpretation of the agreed to terms of the SUB Plan. The employer and unions applied the identical interpretation of the SUB Plan and integrated SUB with TRA to the entire class. Therefore, the claims or defenses of the named employees are typical of the class.

The employees argue that the interests of the employees, as stated in the terms of the SUB Plan are identical to the interests of the class. It would be mere speculation to consider that the class may have interests different from the terms of the SUB Plan, unless the

terms violate the law as does the integration of SUB with TRA. If the terms of the SUB Plan do not violate the law and have not been complied with obviously the class wishes to have the terms enforced, otherwise, the class would have never established the terms of the SUB Plan. Therefore, if the law is violated or if the SUB Plan terms are violated "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole" FRCP 23(b)(2). Whether the employees have enough resources to adequately protect the interests of the class appears to be contingent on how far they can appeal (p. B-10, app. herein).

In Smith v. B & OR. Co., 473 F. Supp. 572, at 582 (D.C. Md., 1979), the

plaintiffs sought "compensatory damages of three million dollars" but the court held that where "the monetary relief is one element of the equitable remedy, and is ancillary to the injunctive or declaratory relief sought as the primary purpose of the suit, it will not prevent (b)(2) treatment."

> "The fact that the plaintiff seeks the award of past unemployment benefits does not effect the certification of this class as a Rule 23(b)(2) class. The monetary relief is essentially in the nature of equitable relief rather than damages, and there is authority to support maintainability of the class under 23(b)(2) in such circumstances. Bermudez v. U.S. Department of Agriculture, 160 U.S. App. D.C. 150, 490 F. 2d 718 (1973); see also, Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211 (5th Cir. 1974); 3B Moore's Federal Practice 23.40," Hodory v. Ohio Bureau of Unemployment Services, 408 F. Supp. 1016, at 1020 (D.C. Ohio, 1976), revd. on other grounds 431 U.S. 471 (1977).

"Where the monetary relief sought is integrally related to and would directly flow from the injunctive and declaratory relief sought, 23(b)(2) status is

appropriate" Souza v. Scalone, 64 F.R.D. 654, at 658 (N.D. Cal. 1974), vacated on other grounds, 563 F. 2d 385 (9th Cir. 1977). See also Morgan v. Labors' Pension Trust Fund, 81 F.R.D. 669, at 681 (N.D. Cal. 1979), where it was said that, "Although Rule 23(b)(2) was not intended to apply to class actions in which the requested relief consisted exclusively or predominantly of monetary damages, courts are not precluded from certifying a class under Rule 23(b)(2) merely because plaintiffs have included a request for monetary damages in their complaint."

IV.

Attorney's Fees Issues

The employees filed a motion for an award of $57,840.00 in attorney's fees (app. 568-578) which was denied (app. 578-579; p. B-25 - B-29, app. herein). And, the employees have incurred an additional $29,160.00 in attorney fees on

appeal to the Eighth Circuit, plus $1200.00 in costs. Although, the employees were denied relief in the district court they were compelled to file a motion for attorney's fees to preserve the issue on appeal and there is authority that an unsuccessful party may be entitled to attorney's fees Winpisinger v. Aurora Corp., 469 F. Supp. 782, 785 (N.D. Ohio 1979).

The law regarding attorney's fees for prevailing employees is more clearly established. Under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, the prevailing employees may recover attorney's fees if the "losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons..." Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, at 258-259 (1975), General Drivers, Etc. v. Sears, Roebuck & Co., 535 F. 2d 1072, at

1076-1077 (8th Cir. 1976). Under Section 502(g) of the Employee Retirement Income Security Act, 29 U.S.C. 1132(g) the prevailing employees may obtain an attorney's fee award in the absence of "bad faith" Landro v. Glendenning Motorways, inc., 625 F. 2d 1344, at 1356 (8th Cir. 1980). 29 U.S.C. 1132 (g) (1) provides that "In any action under this subchapter [other than an action described in paragraph (2)] by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." Therefore, the employees should obtain attorney's fees in any event.

V.

Amendment of Complaint Issues

The employees filed a motion to amend the complaint to conform to the evidence on October 1, 1981, with an amended motion on October 2, 1981 (app.

494-520). The district court held that the "proposed amended complaint would not materially alter the issues, or otherwise state a claim upon which relief can be granted" (p. B-2, app. herein).

The Eighth Circuit has interpreted Rule 15(b), of the Federal Rules of Civil Procedure, according to the plain wording of the rule. In Mason v. Hunter, 534 F. 2d 822, at 825 (8th Cir. 1976) the court stated:

> "It is also true that amendments can be made to conform to the evidence and to raise such issues even after judgment and "failure so to amend does not effect the result of the trial of these issues." If necessary, an amendment can even be made on appeal. See Moore's Federal Practice, Volume 3, Sec. 15.13[2]."

In Mason, supra at 825, the court found that there was no prejudice or surprise. Likewise, here there is no surprise or prejudice because the employees have, since April 22, 1981, asserted that the employer contributes less into the SUB

fund as a result of integrating SUB with TRA (app. 245) and it is not prejudice to require the employer to comply with the law.

The employees have in their second amended complaint alleged that this is an action to enforce their rights under the SUB Plan (app. 160) and the employees suggest that the allegation includes the breach of the fiduciary duty which was and now is specifically alleged in the employees complaint to conform to the evidence (app. 504-505). No trial was had in this matter and all the evidence admitted to by the employer was in the employees possession, although, it took awhile to establish exactly were the breach of fiduciary duty occurred. The issue was briefed at the district court level (app. 469-470). As the district court correctly pointed out "plaintiffs' proposed amended complaint would not ma-

terially alter the issues" (p. B-2, app. herein). Nevertheless, the employees wish to amend to avoid any failure to allege challenge by the employer and unions. It is error not to freely allow amendments "when the presentation of the merits will be subserved thereby" J. C. Millet Co., v. Distillers Distributing Corp., 258 F. 2d 139, at 144 (9th Cir. 1958).

CONCLUSION

The employees conclude that the employer and unions have and are illegally integrating SUB with TRA, as a result of integration they have breached their fiduciary duty as administrators of the SUB Plan. As a result of the employer and unions failure to process and perfunctory handling of the employees appeals, holding the employees to standards not in the SUB Plan, inconsistent and superfluous interpretations of the terms of the SUB Plan, the unions have breached their

duty of fair representation and the employer has breached the collective bargaining agreement, as it pertains to the SUB Plan. The employer and unions should pay to the employees or into an appropriate fund, either from the SUB fund or in damages, the amounts integrated. The employer should contribute into the SUB fund the exact monetary advantage it has received as a result of integration and the employer and unions should be enjoined from further integrating SUB with TRA, enjoined from recoverying alleged SUB overpayments where notice was not given within 120 days from the date of issue of the SUB draft or check involved and should be enjoined from including SUB payments as an alleged overpayment where the State System benefits were not received or receivable for the week the SUB were paid. The employer and unions should pay to the employees, from the SUB fund

or in damages, the amounts recovered as an alleged overpayment of SUB where notice of the alleged overpayment was not given within 120 days from the date of issue of the SUB check or draft involved and the amounts where the State System benefits were not received or receivable when the SUB were paid.

Further the employees contend this action is appropriate for 23(b)(2) class action if the class is not otherwise granted the identical relief the named employees are granted, that they are entitled to their attorney's fees and that they should be granted leave to amend the complaint to conform to the evidence or amend to also include allegations of conversion, conspiracy, and punitives.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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A P P E N D I X A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 82-2076

Bennie J. McKenzie,	*	Appeal
	*	from
Anthony W. McKenzie,	*	the United
	*	States
Jane H. Tuttle,	*	District
	*	Court
Gary L. White,	*	for the
	*	Western
Edward C. Reidlinger,	*	District
	*	of Missouri
Appellants,	*	
	*	
v.	*	
	*	
General Motors Corporation,	*	Affirmed
	*	
Local Union 93 of the International Union United Automobile Aerospace and Agricultural Implement Workers of America-UAW,	*	June 30, 1983
	*	
International Union United Automobile Aerospace and Agricultural Implement Workers of America-UAW,	*	
	*	
Appellees.	*	OPINION

Submitted: June 13, 1983

Filed: June 30, 1983

Before JOHN R. GIBSON, GEORGE G. FAGG, Circuit Judges, and HENRY WOODS,* District Judge.

JOHN R. GIBSON, Circuit Judge.

Appellants, five employees of General Motors Corporation and members of Local Union 93, appeal from an order of the district court directing summary judgment in favor of appellees, denying certification of a class under Rule 23 of the Federal Rules of Civil Procedure and denying attorneys' fees. Appellants argue that the district court erred in granting the summary judgment and in refusing to certify a class and in denying attorneys' fees. Having carefully considered the arguments advanced by appellants, we affirm.

---

*The Honorable Henry Woods, United States District Judge, Eastern District of Arkansas, sitting by designation.

Appellants, as employees of General Motors and members of Local 93, are governed by a Collective Bargaining Agreement between the Union and General Motors which includes a Supplemental Employment Benefit Plan, known as a SUB Plan. The purpose of the SUB Plan is to augment unemployment compensation benefits and other compensation received by laid-off workers. Beginning in December, 1979 massive lay-offs occurred and appellants received unemployment compensation and SUB benefits for various periods from December 2, 1979 through September, 1981.

Appellants also received, because of their unemployment, Trade Readjustment Allowances (TRA) pursuant to 19 U.S.C. 2101 for a period commencing October 1, 1979. They were later informed of overpayment of SUB benefits because of their receipt of the TRA benefits, and that the SUB Plan would insist on recoupment of these

over payments.

Appellants brought this action to challenge recoupment of the SUB benefits.

The district Court denied certification of a class because of the possibility of conflicting interests of the potential class members and inadequacy of representation, not only that of the individual appellants because of inadequate financial resources, but the limited experience of trial counsel.

The district court observed that appellants' contentions would result in their receiving income in excess of what they would have earned had they been employed during the period in question. The district court ruled that recoupment of SUB benefits because of the TRA payments was not barred by statute or regulation. The district court further ruled that whether the 120 day notice provision of the Collective Bargaining Agreement

was met, and whether the terms of the SUB Plan include retroactive benefits as overpayments, are clearly matters of interpretation of the agreement. Therefore, the decision of the Local Committee and the Board of Administration of the Union with respect to these issues were within the scope of the authority of these arbitral bodies, and were final and binding on appellants.

On this appeal appellants urge that the district court erred in the following respects:

(1) integration of SUB with TRA is prohibited by law and regulation and renders the employers and Union liable for breach of fiduciary duty;

(2) arbitrary, capricious and bad faith conduct by employers and the Unions with respect to the arbitral process render the Unions liable for breach of fair representa-

tion and the employer liable for breach of the Collective Bargaining Agreement;

(3) the action was properly maintainable under Rule 23(b)(2) as a class action;

(4) that attorneys' fees should have been allowed; and

(5) that appellants should have been allowed to amend their complaint.

We have carefully considered all of the arguments urged by appellants, and we find them to be without merit. The district court properly denied the class and properly ruled that the recoupment of the overpayment of SUB benefits was not barred by law or regulation and thus the findings of the arbitral bodies were final and binding upon appellants. We conclude that there were no findings of fact clearly erroneous, and no errors of

law in the memorandum opinions and orders of the district court. Accordingly, we affirm for the reasons enumerated in the carefully reasoned opinion of the district court. See 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[Not to be published]

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 82-2076-WM September Term, 1982

Bennie J. McKenzie, et al, Filed
June 30, 1983

Appellants,

vs.

General Motors Corporation, et al,

ROBERT D. ST. VRAIN
CLERK

Appellee.

Appeal from the United States District Court for the Western District of Missouri.

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed. See Eighth Circuit Rule 14.

June 30, 1983

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

BENNIE J. McKENZIE, et al.,	)	No. CV-80-0966-CV-W-6
Plaintiffs,	)	
v.	)	MEMORANDUM OPINION AND ORDER DIRECTING JUDGMENT FOR DEFENDANTS
GENERAL MOTORS CORPORATION, et al.,	)	
Defendants.	)	August 13, 1982

SACHS, J.

Before the Court in the above-captioned cause is plaintiffs' motion for class certification, plaintiffs' motion for leave to amend the complaint (framed as a complaint to conform to the evidence, which would be the third amended complaint), and cross-motions of all parties for summary judgment. Extensive stipulations of fact have been filed and briefing has been submitted as to all motions. The Court finds that class certification should be denied, that plain-

tiffs' proposed amended complaint would not materially alter the issues, or otherwise state a claim upon which relief can be granted, that no material facts are in dispute, and that defendants are entitled to judgment as a matter of law.

Plaintiffs are, or were at relevant times, hourly-rated employees at defendant General Motors Corporation's (GM or the Company) Leeds Plant. The exclusive bargaining representative for such employees is defendant United Automobile, Aerospace and Agricultural Implement Workers of America and that international union's Local Union 93 (UAW or the Union). Terms and conditions of employment of the plaintiffs and the other hourly-rated employees are governed by a collective bargaining agreement, which includes a supplemental unemployment benefit plan, known as the SUB plan. The purpose of the SUB plan is to augment unemployment compensa-

tion benefits and other compensation received by laid-off workers so that an employee would receive the equivalent of 95% of the ordinary weekly net pay, less $12.50 for work-related expenses not incurred. The Company administers the plan, including initial determinations of eligibility and collection of benefit overpayments.

A procedure is provided under the SUB plan for appealing the Company's written determination of payment, denial or overpayment of benefits. The appeal is to a Local Committee, consisting of both Union and Company representatives, and, if not resolved by the Local Committee, to the Board of Administration.

Beginning in December, 1979, massive lay-offs occurred at the Leeds Plant, at one point including approximately 2,000 employees comprising the entire second shift. Plaintiffs received unemployment compensation and SUB benefits for various

periods from December 2, 1979, through at least September of 1981. As a result of a later certification of eligibility by the Secretary of Labor, on April 25, 1980, plaintiffs eventually also received Trade Readjustment Allowances (TRA) payments, pursuant to 19 U.S.C. 2101 et seq., for a period commencing October 1, 1979. However, no individual employee could receive TRA payments until determined to be eligible by the Missouri Division of Employment Security. The first employees at Leeds determined eligible were so determined on May 21, 1980, and received notification of that entitlement shortly thereafter. The first checks for TRA payments were also issued May 21, and employees received checks reflecting retroactive benefits until in July, 1980, TRA began being paid contemporaneously with the benefit week.

On September 9, 1980, the plaintiffs

were mailed a notice informing them that an overpayment of SUB benefits had been determined, based on their receipt of TRA benefits. It is stipulated that plaintiffs received those notices within 120 days after May 21, 1980. Approximately 4,053 employees were sent such notices. Those employees who did not voluntarily return the overpayment (and have returned to work) have had their weekly pay reduced in an amount allowed by the plan, in order to recoup the overpayment.

Plaintiffs challenge the recoupment of SUB benefits on several grounds, the main points of which may be briefly stated as follows: 1) the recoupment violates 29 C.F.R. 91.60, which prohibits offset or recovery of TRA benefits under any law other than the Trade Act of 1974; 2) the determination of overpayment and notice to employees was not made within the 120 days of overpayment as required

by the SUB plan, 3) the terms of the SUB plan do not include retroactive benefits from other sources as overpayments, and, 4) the SUB plan, and defendants' method of determining the overpayments in the instant case, violates various provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et seq.

The proposed class would include all employees at Leeds after October 1, 1979, who were members of the Union, received TRA benefits, were notified of an overpayment of SUB benefits "more than 120 days after April 12, 1980" and who have had or are having benefits recouped for periods more than 120 days prior to the notices. Plaintiffs contend that the class can be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure because the action is primarily for declaratory and injunctive relief, with any monetary relief only "ancill-

ary." Defendants' foremost basis of opposition to certification is the inadequacy of representation, although it is also argued that any certification would be under (b)(3), requiring notice to the class. The Court finds that plaintiffs have not established adequacy as class representatives, but, moreover, that a class action is unnecessary to the relief requested and would unduly burden the parties and the Court while accomplishing no purpose.

The burden of proof is on the party seeking class certification to establish compliance with the requirements of Rule 23. Smith v. Merchants & Farmers Bank of West Helena, 574 F.2d 982, 983 (8th Cir. 1978); Reynolds v. Dukakis, 441 F. Supp. 646, 650 (D.Mass. 1977). Where a decree could be fashioned which would "run to the relief both of [named plaintiffs] and all others similarly situated...a

class action is neither useful nor required." Coffin v. Secretary of HEW, 400 F. Supp. 953, 956 (D.D.C. three judge court, 1975), app. dism., 430 U.S. 924. See also, Nelson v. Likins, 389 F. Supp. 1234, 1239 (D.Minn. 1974) (if plaintiffs succeed, relief would change policy, which would inure to benefit of those similarly situated), aff'd, 510 F.2d 414 (8th Cir. 1975); Thomas v. Weinberger, 384 F. Supp. 540, 543 (S.D.N.Y. 1974). Plaintiffs have advanced no purpose or persuasive reason why a class should be certified if this action were treated as primarily for declaratory and injunctive relief.

If, on the other hand, the monetary relief requested were to be considered to necessitate notice to the class, the alternative grounds for denial of this motion become even more compelling. In any class certification proceeding, plain-

tiffs must establish that "the representative parties will fairly and adequately protect the interests of the class." Numerous problems in this area appear at first blush, including the possibility of conflicting interests of potential members of the class, for example, between those employees who have grieved the recoupment action and those who have not, either in interest of preservation of the fund for their future benefit or for other reasons which cannot be known to the Court at this time. However, even absent an analysis of these more complex factors, the adequacy of representation is too questionable to allow certification.

Two aspects of adequacy of representation are especially pertinent here. The named representatives must be able to "act as fiduciaries for the proposed plaintiff class," and must have suffi-

cient resources to finance the action in the trial court, and, possibly on appeal. See generally, Esler v. Northrop, 86 F.R.D. 20 (W.D.Mo. 1979). A review of the depositions of plaintiffs in this cause, and affidavits filed, readily reflects inadequacy of resources when viewed in terms of any class action. In fact, most of the plaintiffs claimed that the small amount of recoupment was a financial hardship. Class certification has been denied where there was a much greater showing of financial resources for litigation. Ralston v. Volkswagenwerk, A.G., 61 F.R.D. 427 (W.D.Mo. 1973). "[T]he named plaintiffs must sustain the burden of showing their resources are adequate to pursue this lawsuit to completion, even in the absence of any additional financial contributions from members of the purported class...Inadequate financing threaten the procedural and substan-

tive interests of all members of the class." Id. at 433-34.

> Whether the proposed class counsel will adequately represent the members of the proposed class must also be determined by the Court. The central inquiry is whether counsel is experienced with the type of class litigation involved in the case, and generally able to conduct the proposed litigation. All of the resources of counsel must be evaluated, including professional experience, motivation, competence, support personnel, and other professional commitments.

Esler v. Northrop, supra at 37 (citations omitted).

The Court does not intend this ruling as any reflection on counsel's ability to zealously represent an individual client in most general civil litigation, or a comment as to his motivation, which is obvious from his enthusiastic efforts in this case. But representation of a class is not to be taken lightly, and a review of all of the factors involved must result in a finding that class representation would be inappropriate. While

some of the issues raised by counsel are rather novel, the briefing and treatment of those few cases most closely on point to the instant action cannot be readily categorized as impressive. See Smith v. Merchants & Farmers Bank of West Helena, supra at 984. As to trial experience, counsel states that "he has tried parts of domestic relations cases in circuit court and has presented evidence in a hearing for a preliminary injunction against interference with a driveway easement in which the client obtained the injunction." Reply suggestions at 2. His only experience in federal court is in bankruptcy. Counsel described his practice as general, "just a little bit of everything that isn't too sophisticated." Borntrager deposition at 6. He is not associated with a firm and has no assistance from any other lawyer. His support staff is virtually nonexistent. He has

never represented a class in any litigation, and has not represented an individual in a claim under ERISA, under 301 of the National Labor Relations Act, or in any case which would appear similar to the instant action. While there must be a "first time" for each type of case for every lawyer, these factors in combination render it inappropriate for this action to be the "first time" for counsel to undertake the responsibility for all of these areas novel to him, considering his resources. Class certification will be denied.

Before embarking on a discussion of each of the claims made by plaintiffs, and in the course of doing so, the motions for summary judgment, one striking undisputed fact may be noted. If plaintiffs were to be successful, it would result in their receipt of income in excess of what they would have earned

had they been employed during the same time period. This factor is pertinent to keep in mind in light of the purpose of all of the benefit programs involved - unemployment compensation, SUB benefits, and TRA benefits - to assist in replacing, to varying extent, income lost due to unemployment. Neither the intent nor the purpose of any of the programs could be defeated by the failure of plaintiffs' claim.* The question is, therefore, whether there is any statutory or contractual provision, which, under the circumstances

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*While not controlling in the instant case, it may be noted that Congress has, since this action was filed, altered the TRA payment program to avoid any windfall effect that may occur even in the absence of a substantial benefits program such as SUB, by requiring exhaustion of all state unemployment benefits prior to receipt of any TRA and thereafter limiting the amount of TRA to state unemployment compensation levels. See 2 U.S. Code Cong. & Admin. News 1981 at 710; 19 U.S.C.A. 2291 (August 13, 1981).

of this case, entitled plaintiffs to retain the windfall of all of the benefits combined.

By regulation, 29 C.F.R. 91.60, TRA benefits have been exempted from the reach of virtually all creditors prior to payment. Plaintiffs argue that the "no offset or recovery" provision of this regulation extends to precluding recoupment of other benefits (here, SUB) by reason of payment of TRA, because it is in effect recoupment of TRA benefits. There is no legal authority supporting this contention. The first flaw in this argument is obvious: the recoupment is not of TRA, but is of SUB. It would not be recovered by the company on behalf of the plan if it had not been paid out of the SUB fund - i.e., if the employees had received only unemployment compensation and TRA benefits, there would be no recovery by the company. SUBenefits are

to make up the difference between other benefits paid and the 95% salary level, and are what the name implies, supplemental, to those other benefits.

Plaintiffs argue, rather contradictorily, that TRA benefits should not have been given to workers who had SUB available and that the regulation was "designed to stop the method of using employees to obtain government monies." Several courts have rejected the same or similar arguments that recoupment of SUB due to subsequent payments of TRA benefits somehow violates the letter or the spirit of the act. Soboleski v. Ford Motor Co., No. 76-2240 (D.N.J. March 11, 1977), app. dism., No. 77-1787 (3d Cir. November 11, 1977); Shelpman v. Int'l Harvester Co., No. C-3-76-324 (S.D.Ohio), aff'd, 601 F.2d 590 (6th Cir. 1979); Lumpkins v. General Motors Corp., No. 81-0402-C(5) (E.D.Mo. October 27, 1981). It has also

summarily been held that the Trade Readjustment Act provides no legal rights to individual plaintiffs in challenging a SUB recoupment, beyond those rights in the collective bargaining agreement. Holbrook v. Dana Corp., No. 78-0576 (Court of Common Pleas, Lucas County, Ohio December 19, 1980). And, in light of Soboleski and Shelpman, supra, still another court found that it would be difficult for plaintiffs to establish any likelihood of success on the merits, and a temporary restraining order was denied. Duke v. UAW, No. C81-525-A (N.D.Ga. April 24, 1981). The contentions in the instant case are nearly identical to those above, except for the additional citation of the regulation itself, which the Court finds lends nothing to plaintiffs' argument. No authority was cited in support of the argument, and the only authority located which is at all favorable to

plaintiffs in this regard is United Steelworkers v. Latrobe Steel, 452 F.Supp. 63 (W.D.Pa. 1978). That decision did not deal directly with the contentions that a recoupment of SUB due to TRA would violate the Act, but rather enforced and arbitrator's decision, under the traditional standard of review for such decisions of whether it was within his jurisdictional authority under the collective bargaining agreement, that the recoupment was not authorized under the agreement. In viewing this decision within its proper context, the Court agrees that whether the SUB plan in question allows recoupment is an arbitral issue. In this case, that finding actually is supportive of defendant's position, as will be further discussed, infra. Apart from the question of the provisions of the collective bargaining agreement for recoupment, the decisions of all other courts in finding

that no TRA provision bars recoupment are persuasive and will be followed.

The plaintiffs challenge the final and binding nature of a decision by either the Local Committee or the Board of Administration on any of the issues herein, apparently on the grounds that 1) the union breached its duty of fair representation and 2) the decisions were arbitrary and capricious. The decisions of such bodies, as part of the grievance procedure set up within the collective bargaining agreement, are the equivalent of the decision of an arbitrator and are reviewed by a court only on the same grounds, i.e., whether the decisions are within the scope of the collective bargaining agreement. E.g., Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); Warren v. Int'l Brotherhood of Teamsters, 544 F.2d 334, 340 (8th Cir. 1976) and cases cited therein. The decision whether

the 120-day provision of the agreement was met, and whether the terms of the SUB plan include retroactive benefits as overpayments, are clearly a matter of interpretation and application of the agreement and therefore within the scope of the authority of the arbitral body.

A union does not necessarily breach its duty of fair representation simply by opposing the position of some individual members. King v. Space Carriers, Inc., 608 F.2d 283, 288 (8th Cir. 1979) (citing Humphrey v. Moore, 375 U.S. 335, 349 (1964)). As stated by the Court in Humphrey, "Just as a union must be free to sift out wholly frivolous grievances which could only clog the grievance process, so it must be free to take a position on the not so frivolous disputes." As in Humphrey and King, plaintiffs herein have not "suggested what they could have added to the hearing by

way of facts or theory if they had been differently represented." 375 U.S. at 350-51; King, supra. There was little or no dispute as to facts. The plaintiffs simply disagreed with the interpretation given the contract by the company and union. In King, no breach of duty was found even though the union president had stated his position opposing the grievants before the joint committee. Nothing has been presented in this case that would support a finding of breach. Therefore, the decision as to the 120-day notice and the inclusion of retroactive benefits as overpayments are final and binding on the plaintiffs.

The contentions of ERISA violations are rather vague, conclusory and confusing. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) deals with nonforfeitability of vested pension rights, and is inapplicable to the case

at bar. Recoupment of SUBenefits has been held allowable under ERISA. Logan v. Chev. Mfg. Div., General Motors Corp., No. 79-40239 (E.D.Mich. April 15, 1981). The provisions of the collective bargaining agreement would appear to meet the procedural requirements of 29 U.S.C. 1133. Plaintiffs have stated no other allegations which would support any valid challenge to the plan under the statute.

Defendants have counterclaimed for declaratory judgment that the recoupment is valid, and filed a motion for summary judgment to that effect, which will be granted for the reasons stated above. Attorneys' fees are requested by defendants under 29 U.S.C. 1132, on the grounds that "plaintiffs action is frivolous, unreasonable and without foundation." Motion of Defendant-Intervenor for Summary Judgment at 2. It is further argued that attorneys' fees would be ap-

propriate on this basis at common law. Defendant-Intervenor union included in its suggestions a request for "bifurcation" of the attorneys' fees issue and subsequent briefing. No briefing on this issue has been submitted as yet by any party. While the standards are such that the Court is unlikely to award defendants attorneys' fees under the instant circumstances, Humel v. S.E. Rykoff & Co., 634 F.2d 446, 452-53 (9th Cir. 1980); Landro v. Glendenning Motorways, Inc., 625 F. 2d 1344 (8th Cir. 1980), any appropriate affidavits, motions and briefing filed by defendants within ten (10) days of the date of this Order will be considered. If defendants do continue to seek attorneys' fees, and make such filing, plaintiffs may file any suggestions in opposition within twenty (20) days of the date of this Order. SO ORDERED.

It is hereby ORDERED that plain-

tiffs' motions for class certification and for summary judgment are denied, and the motions of defendant and defendant-intervenor for summary judgment are granted. The Clerk is directed to enter judgment against plaintiffs and in favor of defendant and defendant-intervenor on all issues. Such judgment will be entered fourteen (14) days after the date of this Order, if no claim for attorneys' fees has been filed. If such a claim is made, the judgment entry will be deferred until further ruling by the Court.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: August 13, 1982.

IN THE UNITED STATES DISTRICT COURT

THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

BENNIE J. McKENZIE, et al.,	)	No. CV-80-0966-CV-W-6
Plaintiffs,	)	
v.	)	ORDER DENYING PLAINTIFFS' MOTION FOR ATTORNEY FEES AND DIRECTING ENTRY OF FINAL JUDGMENT
GENERAL MOTORS CORPORATION, et al.,	)	
Defendants.	)	August 30, 1982

SACHS, J.

Plaintiffs, the unsuccessful parties in this litigation, seek attorney's fees under the broad discretion granted ERISA cases. 29 U.S.C. 1132. They cite no case actually allowing fees to the unsuccessful party, and suggest that the motion has been filed "to preserve their right to attorney fees if they are successful on appeal." They do, however, quote a case stating that an allowance to an unsuccessful party is possible. Winpisinger v. Aurora Corp., 469 F. Supp. 782,

785 (N.D. Ohio 1979). In Winpisinger, the court was using an argument to hold down fees allowed to attorneys for the successful parties. l.c. 786. The observation was to the effect that the contingency was less extreme than posed by counsel, in that fees might have been awarded even if they had lost. This verges on dicta and is not strong authority for plaintiffs, especially where the ruling of the district judge also denied a fee request against the employer. l.c.792.

The appellate courts have noted that fees to a non-prevailing party are not likely to be awarded, as a practical matter (Marquardt v. North American Car Corp., 652 F. 2d 715 (7th Cir. 1981)) and indicate that a trial judge may give lack of success as a short answer to a fee request. Fase v. Seafarer's Welfare and Pension Plan, 589 F. 2d 112, 116 (2d Cir. 1978)(Friendly, J.). The lack of

authority for awards to losing parties speaks for itself, in showing how ERISA is being construed in practice.

It is conceivable that special circumstances might justify an award to a losing party. For example, if the equities strongly favored that party, but some close technical ruling precluded relief, it might be supposed that the situation demanded litigation, and discretion might be exercised in favor of compensation of counsel. Such is not the case here, where, as noted in the Court's earlier ruling, plaintiffs are seeking a windfall such as occurs when there is double insurance coverage.[1] Another situation in which there might be compensation for an attorney for unsuccessful parties

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1. The Court is not unsympathetic with the situation of persons who have spent their money and are hard pressed when forced to repay, but the fact remains that they seek to retain a windfall.

may be when some very significant question needs to be answered. The instant case presents, in the Court's view, no such close, important issue.[2] The present case is typical of the type of litigation in which attorneys enter into contingent fee contracts, after carefully appraising the likelihood of success, and take their chances.

The motion for allowance of attorney's fees is therefore DENIED.

It is further ORDERED that judgment be entered forthwith, in accordance with the memorandum and order of August 13, 1982.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: August 30, 1982.

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2. A current news item which appears to relate to the situation at bar indicates that defendants may be claiming some $90 million from 29,000 former employees for overpayment of benefits. K.C. Star, August 29, 1982, page 7A. While

the magnitude of the issue (if the Court understands the news item) does tend to support a claim of importance the Court has continuing doubt that plaintiff's counsel was realistic in taking on and pursuing this litigation all by himself.

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF MISSOURI

BENNIE J. McKENZIE, et al.,	)	No. CV-80-0966-CV-W-6
Plaintiffs,	)	
v.	)	JUDGMENT
GENERAL MOTORS CORPORATION, et al.,	)	
Defendants.	)	August 30, 1982

This action came on for determination before the Court, Honorable Howard F. Sachs, United States District Judge, presiding, and the issues having been duly determined and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiffs' motions for class certification and for summary judgment are denied, and the motions of defendant and defendant-intervenor for summary judgment are granted. Judgment is entered against

plaintiffs and in favor of defendant and defendant-intervenor on all issues.

Dated at Kansas City, Mo., this 30th day of August, 1982.

/s/ H. C. Lawhon
Deputy Clerk of Court

Certificate or Affidavit
of Service

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

I, Ezra Eli Borntrager, state that, on the 1st day of September, 1983, pursuant to Rule 33, Rules of the Supreme Court, I personally served copies of the foregoing, Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, on each of the parties required to be served herein as follows:

1. By leaving 3 copies with the receptionist at the Law Offices of Gage & Tucker, 2800 Mutual Benefit Life Building, 2345 Grand, Kansas City, Missouri 64108, and directing the receptionist to give the copies to Paul Scott Kelly, Jr. or John J. Yates, Counsel of Record for Respondent General Motors Corporation.

2. By leaving 6 copies with the receptionist at the Law Offices of WHIPPLE & KRAFT, P.C., Gate City Bank Bldg. - Suite 200, 1111 Grand Avenue, Kansas City, Missouri 64106, and directing the receptionist to give the copies to C. David Whipple and David W. Whipple, Counsel of Record for the Respondent Unions, together with John Fillion and Leonard Page, International Union - UAW, 8000 E. Jefferson Avenue, Detroit, Michigan 48214.

All Parties required to be served have been served.

Ezra Eli Borntrager
520 Campbell
Kansas City, Missouri 64106
816/221-5682

Counsel for Petitioners

Subscribed and affirmed to before me on this ___ day of _____, 1983.

_____
Notary Public